The Efficiency Inducement of Apologies and the Law

Solari

Microeconomics

Professor Fowles
Abstract
Efficiency is a critical focus of study for economists and the economics field. Contract, property right, criminal, and anti-trust laws, to provide a brief list, arose from a need to ameliorate the effects of inefficiencies within economizing activities of individuals. However its original intent, the law has evolved, due to social and political influences, to arguably be a source of great inefficiency of outcomes. In this paper, we explore the concept of apologies to bring forth greater efficiency of outcomes in the realm of the law. A case study is presented to highlight the possible effectiveness of apologies to decrease, and in some instances remove, the additional, inefficient costs associated with the production of “justice.” Game theory will assist in illuminating the reasons against the use of apologies in the current social milieu; research will provide insight and context into the theoretical utilization of apologies in creating efficient outcomes.
Introduction

On June 18th 2014 police were called to a neighborhood due to a missing child. The police began their investigation by conducting a canvas of the surrounding homes in proximity to the child’s domicile. Brett Olsen was one of the many police officers called to the scene, and was part of the canvassing party in search of the missing child. Olsen, in the process of canvassing the neighborhood, entered the fenced backyard of Sean Kendall a homeowner, in hopes of finding the missing child. According to the Salt Lake Tribune article\(^1\) titled: “Geist’s owner sues, seeks $2M from Salt Lake City over shooting of dog by police officer,” Brett Olsen upon entering the backyard encountered Geist, a two year old Weimaraner dog weighing approximately 100 pounds. The article states that, Geist “reacted by barking and running towards Olsen,” Olsen proceeded to shoot Geist twice in the chest, mortally wounding the dog—there was no mention in the article of Olsen’s efforts to save the wounded dog. The child was later found, safe in the basement of his home. And Kendall was notified of the death of Geist by animal control an hour after the occurrence.

Kendall, who is seeking justice for the perceived wrong, is suing the city of Salt Lake City, for punitive damages related to the death of Geist. Kendall, and his lawyer Ross “Rocky” Andersen, argue the fact that Kendall’s constitutional rights were violated; specifically as they believe the necessary criteria for exigent circumstances (a part of the law allowing officers, given specific scenarios, the ability to warrantless, nonconsensually, and forcibly enter a home\(^2\)) were unmet, and the police officer had no jurisdiction to enter Kendall’s property without a proper search warrant. Kendall’s claim stems from the psychic costs associated with the
injustice committed by the Salt Lake City police force. These costs are associated with the death of his companion, and the perceived injustice surrounding the series of events. A source close to the case claims Kendall was primarily interested in a sincere apology from the city, and mitigation efforts by the city to prevent instances such as Geist’s death from occurring in the future; specifically in the form of training for officers in the management of possible hostile canine situations.

The case will be decided at a future date and we are left to wonder the possible costs associated with this law suit. Regardless of the outcome there will be significant costs incurred to society with Kendall suing the City of Salt Lake, and the City defending itself from Kendall’s suit. These costs are likely to near a million dollars and possibly more if Kendall wins the case, and is awarded the requested two million dollars in damages. Economically, are either of these outcomes (the City, or Kendall winning) efficient? Could either of these outcomes be a market failure such as a negative externality? Are there more socially optimal solutions associated with this situation between the city and Kendall?

A hypothetical situation could be imagined in were the City of Salt Lake earnestly apologized to Kendall, and invested in canine training for its officers for the purpose of ameliorating similar incidences in the future. An argument could be made within the hypothetical, comparing the cost of the actual situation, that the cost to society of the hypothetical situation is considerably less. In this case, the sincere apology, partnered with actions by the City to prevent similar situations from occurring may have been a more socially optimal outcome. The role of the apology, in this instance, would be to decrease the “psychic”
costs associated with the wrong. Specifically, the disutility caused by the unjustly cessation of
Geist’s life, and the transgression of the police officer in relation to Kendall’s constitutional
rights. The power of apologies to decrease the costs associated with litigation, and therefore
the costs to society, is potentially a panacea to combat the increasing costs correlated with
litigation in America. We provide a professional example where apologies have been
increasingly implemented to decrease litigation costs and the modality through which apologies
accomplish their efficient outcomes is now explored.

Apologies and Medicine

In medicine, mistakes are often deadly. Doctors and care providers are under extreme
scrutiny to provide outstanding and proper care for their patients; unfortunately, the ability for
humans to perform error free, even for doctors, is impossible and errors are committed. When
errors do occur, hospitals and staff are potentially liable for the outcomes; and apologies are
often desired from patients to assume responsibility for the error. Unfortunately, in reality
apologies are rare, and when they are utilized, they are incomplete and provide slight
modicums of information\textsuperscript{3}, leaving the patient with uncertainty, and a feeling of distrust. These
errors, often lead to malpractice lawsuits, as an effort by the patient, or the patient family, to
recover for “hard” costs associated with the malpractice.\textsuperscript{4} In addition, there are “soft” or
psychic costs associated with medical errors. Apologies assist in the recuperation of “soft”
costs, and assist parties in bridging gaps of understanding when negotiating and bargaining for
settlements. Increasing the likelihood that a medical error is resolved through mediation
decreases litigation costs, and increases the efficiency of the outcomes associated with these
medical errors—similarly, an apology by the City of Salt Lake may have prevented Kendall’s lawsuit.

In an effort to curtail litigation costs, several major hospital networks have formally implemented strategies for the institutionalization of apologies in medicine. One example is the VA Medical Center in Lexington Kentucky, which piloted a full-disclosure protocol championed by the Sorry Work! Coalition. The coalition argues for root-cause analyses of medical errors when they occur, and when the error is found to have been caused by negligence or human error: provide and apology, admit fault, and explain with sufficient detail the error to the patient and their family. According to the coalition, the full-disclosure protocol is effective at decreasing litigation costs. The coalition provides the following evidence, among others; the VA center in Lexington had an average settlement cost of $16,000 versus $98,000 which was the mean across the general VA network. In addition, UM (University of Michigan) Health System was successful in decreasing the number of pending cases in half, and decreased their cost per case, derived from litigation efforts, from $65,000 to $35,000.5

Clearly, providing an apology in the medical realm is successful in decreasing costs associated with litigation, and improving the likelihood of settlement, which are more socially efficient outcomes. Next, we turn to a fundamental understanding of the modality through which apologies create the aforementioned outcomes in medicine and potentially in society at large.
Economic Modality of Apologies

According to Jennifer K. Robbennolt, apologies work to bring about greater efficiency in settlements by impacting three critical levers related to the concept of settlement: reservation price, aspirations, and fair settlement. The crux of the theory rests on these levers and their impact on two parties’ ability to come to an agreement in the process of settlement. If the assumption, when considering efficiency in the law, rests on the fact that settlements are more socially optimal and desirable as it decreases society’s share of the burden associated with a “wrong,” then an understanding of the causal link between apologies and settlement is critical; Robbennolt argues these aforementioned levers are these critical factors. To provide clarity to Robbennolt’s nomenclature, in utility terms the reservation price is the minimum value the negotiators are willing to accept, the fair settlement would be the mid-point, and the aspiration price would be the utmost highest value. Robbennolt argues that apologies work to influence these levers by: decreasing uncertainty associated with the case outcome, substituting financial gain with psychic satisfaction, and the effects of social norms (reciprocity). These three influences help in calibrating the levers of the negotiators, in order to bring about overlaps in the negotiators willingness to settle, below is a diagram of the influence of apology in relation to price and the willingness to settle.
Robbennolt tested the effect of apology on these levers, by utilizing price as a proxy, in an experiment which included a hypothetical accident (a bicyclist is hit by a motorist), the participants were asked to place themselves in the role of assisting the bicyclist in achieving a settlement with the motorist. The degree of culpability (clear versus ambiguous), evidentiary rule (protected, admissible, and no mention), and whether or not an apology was tendered (full, partial, and no apology) were varied, and randomly applied to the participants. Robbennolt observed a marked and statistically significant difference in the reservation, fair offer, and aspiration prices across apology levels, especially when coupled with a clear level of culpability—when an apology was provided at all levels of evidentiary rule and culpability, the levers were significantly less in their value.
The results from the experiment add credibility to Robbennolt’s concept of the modality through which apologies help to deliver more efficient outcomes in settlements. Unfortunately, although apologies have been demonstrated to assist in the resolution of legal conflicts, the legal profession is tentative to adopt apologies as a legal tool; we now turn to game theory for an explanation.

The Game Theoretic Aspect of Apologies

Consider the following simple game. Individual “B” has been allegedly “wronged” by individual “A.” There is a 50% chance if individual A does not admit fault, and therefore does not provide an apology, that individual A will incur minimal costs associated with the “wrong.” Conversely, there is a 95% chance that if individual A apologizes, and therefore admits fault and guilt that individual A will incur very high costs. Below is a diagram associated with this simple game:

Suppose whether or not the defendant apologizes, they still must incur litigation costs associated with defending themselves—with this assumption, we are constricting the possibility
of a “pass,” or that the plaintiff drops the claim and or settles for less than the litigation costs. As can be easily ascertained from the game depicted above, the defendant will choose to not apologize; as we are assuming the defendant is rational, self-interested, and utility maximizing. With the no apology option, the defendant increases their chance of incurring minimal costs ten-fold. Although admittedly simple, the game does illuminate the crux of the issue with apologies: they impact legal outcomes. In the American legal system apologies are admissible as evidence into court proceedings, and often are seen as admission of guilt, therefore it is safest not to apologize. 7 35 states have “apology laws,” allowing claimants to provide expressions of sympathy and benevolence. 8 These expressions of sympathy and benevolence cannot include statements of responsibility, fault, and or guilt, these statements would be exempt from these “apology laws” and would be admissible in a court of law.

The expressions of benevolence and sympathy, although they assist in ameliorating psychic costs, are not the profound statements of responsibility which bring about significant efficiencies in the creation of resolving settlements. Clearly, full responsibility assuming apologies, the type which are most effective at decreasing soft costs associated with “wrongs” are institutionally, legally, and professionally suppressed.

Conclusions

Evidence has been provided to the powerful effect of apologies to bring forth efficiencies in the market for justice. Geist, Kendall’s dog, whose life was ended by an arguably transgression of constitutional rights, will never be able to be replaced by monetary compensation, no matter the amount. Instead, Kendall sought an apology first and foremost.
When one was not forthcoming, Kendal proceeded to engage the legal apparatus to gain justice. Research has provided insight into the modality through which apologies impact legal outcomes, specifically by the degree of apology and culpability. Unfortunately, the American legal system creates a simplified game in which apologies are systematically suppressed. In order for the American legal system to produce the most socially optimal outcomes, legislation should be passed to ensure that full responsibility bearing apologies are inadmissible in the court of law. This would increase the number of apologies provided, and decrease the negative externalities incurred by society in the process of seeking justice.
References


